(2)

No. 90-1856

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In the
Supreme Court of the United States
October Term, 1990

R.J.C.R.,

Petitioner,

v.

J.C.J.D.,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

MEMORANDUM IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court review questions involving the application of the First Amendment to invalidate a Canon of Judicial Conduct, which has since been amended, where the decision below rests not only on the First Amendment but also on independent state grounds?

2. Does the United States Constitution permit state judges to enact a rule that forbids candidates for their offices from stating views on any "disputed legal and political issues" that the voters may consider in deciding which judge to elect?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities v

Statutes and Constitutional Provisions Involved 1

Statement 3

Reasons for Denying the Writ 7

A. The Decision Below Rests on Adequate and Independent State Grounds, and the Legal Issue Involved Is Unimportant Because Kentucky Has Modified Its Code to Eliminate the Language That Was Struck Down in This Case. 7

B. The Decision Below Accords With the General Trend Concerning Permissible Statements in Judicial Elections, and There Are No Broad Conflicts, Among the Lower Federal and State Courts, Whose Resolution is Required. 10

Conclusion 13

TABLE OF AUTHORITIES

Cases: **Page:**

ACLU v. Florida Bar,
744 F. Supp. 1094 (N.D. Fla. 1990) 11

In re Baker,
218 Kan. 209, 549 P.2d 701 (1975) 11

Berger v. Supreme Court of Ohio,
598 F. Supp. 69 (S.D. Ohio 1984) 10

Chisom v. Roemer,
111 S. Ct. 2354 (1991) 3, 6, 7

Gentile v. State Bar of Nevada,
111 S. Ct. 2720 (1991) 12

Gregory v. Ashcroft,
111 S. Ct. 2395 (1991) 3

Hilen v. Hays,
673 S.W.2d 713 (Ky. 1984) 3

In re Kaiser,
111 Wash. 275, 759 P.2d 392 (1988) 10

Morial v. Judiciary Committee of Louisiana,
565 F.2d 295 (5th Cir. 1977) 10

In re Seraphim,
97 Wis. 485, 294 N.W.2d 485 (1980) 10, 11

Stretton v. Disciplinary Board,
763 F. Supp. 128 (E.D. Pa. 1991), *appeal pending* 11

Constitutional and Statutory Provisions:

Kentucky Code of Judicial Conduct

Canon 1 ..... 4, 5, 7, 8
Canon 2 ..... 4, 5, 7, 8
Canon 7 8
Canon 7B(1) 7, 10
Canon 7B(1)(a) 4, 5, 7
Canon 7B(1)(c) ..... *passim*

Kentucky Constitution

Section 1 ..... 1, 8
Section 8 ..... 2, 8
Section 117 ..... 2, 6, 8

United States Constitution

Article III 8
First Amendment 2, 5, 7
Fourteen Amendment, Equal Protection Clause 5

Miscellaneous:

ABA Model Code of Judicial Conduct 6, 7, 8, 9, 11

Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* (1990) 12

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MEMORANDUM IN OPPOSITION

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Kentucky Constitution provides as follows:

Section 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

* * *

Fourth: the right of freely communicating their thoughts and opinions.

> Section 8. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.
>
> Section 117. Justices of the Supreme Court and judges of the Court of Appeals, circuit and district court shall be elected from their respective districts or circuits on a nonpartisan basis as provided by law.

The First Amendment to the United States Constitution provides as follows, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . ..

Supreme Court Rule 4.300, which contains the Kentucky Code of Judicial Conduct, formerly contained the following language in Canon 7:

> B. Campaign Conduct.
>
> > (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election,
> >
> > > (c) should not . . . announce his views on disputed legal or political issues . . ..

As amended since the decision below, Canon 7 now provides as follows, in pertinent part:

> B. Campaign Conduct.
>
> > (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candi-

dates or on the basis of a merit system election,

> (c) should not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .

STATEMENT

This case involves statements made by respondent Justice Dan Jack Combs in his campaign for election to the Kentucky Supreme Court, the state's highest court. As a common law court, it is responsible for guiding the development of the common law of Kentucky. *E.g.*, *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984). It also has the final word in interpreting and applying the Kentucky constitution and statutes.

These powers effectively give the Justices of the Kentucky Supreme Court broad authority both to formulate and to change the law, and thus, as a practical matter, to decide major issues of Kentucky public policy. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403-2404 (1991). To assure that this power is used in a way that the people of Kentucky consider proper, the Kentucky Constitution guarantees the people the right to elect their judges, not only for the Supreme Court, but also for the intermediate appellate court and the trial courts. And, in electing judges to act as their "representatives" in making important government decisions, *cf. Chisom v. Roemer*, 111 S. Ct. 2354 (1991), it is not surprising that the voters are interested in learning about the political and legal positions of the candidates, in order to predict how they will respond when important issues come before the courts.

In 1988, respondent ran for election to the Supreme Court against a sitting incumbent. In his campaign, he publicly reiterated a number of legal conclusions that he had included in his majority and dissenting opinions as a judge on Kentucky's intermediate appellate court. For example, he expressed the belief that the Kentucky Constitution's protection of the right to bear arms extended to felons; that the Kentucky courts had improperly

limited the right to sue for personal injuries by the so-called "fireman's rule" which forbids suits by injured fire fighters against those whose negligence causes the fire; and that the courts should not apply a highly deferential standard in reviewing workers compensation appeals. He also stated that he considered individual rights to be more important than the interests of government bodies and private corporations, and he criticized his opponent for taking the opposite view. Respondent reserved his strongest criticism, however, for the Code of Judicial Conduct itself which, he said, was used by incumbent judges to insulate themselves from criticism and thus to preserve themselves in office by minimizing public understanding of their own conduct in office.

After respondent was elected, petitioner Judicial Retirement and Removal Commission initiated charges against him for having made these statements. The Commission ruled first that it lacked the power to decide whether the Kentucky or United States Constitutions forbade the application of the Code of Conduct to prohibit respondent's statements. Pet. App. 17a. Proceeding to the merits, the Commission found respondent guilty of violating Canon 7B(1)(c), which forbids candidates for judicial office from stating their views on disputed legal and political issues. *Id.* 18a, 20a. The Commission also ruled that he had violated Canons 1, 2, and 7B(1)(a), which require that judges promote public confidence in their integrity and impartiality, that they maintain the dignity appropriate to their office, and that they make no pledges or promises of conduct in office. According to the Commission, respondent's statements about his legal positions and his criticisms of the free speech restrictions in the Canons reduced public confidence in judicial integrity, were undignified, and constituted improper pledges. *Id.* 18a-22a. Accordingly, the Commission suspended respondent from his elected office for three months, without pay, a penalty that was stayed pending review by the Supreme Court. *Id.* 31a-32a.

The dissenting member of the Commission, Dr. Lewis Wesley, agreed that it would be inappropriate for the Commission to invalidate the Code of Judicial Conduct as unconstitutional, but he insisted that the Commission should apply the Code in a constitutional fashion. *Id.* 29a. In that regard, the dissenter argued that the constitutional right of the people to elect their judges carried with it the implicit right of the people to learn the

views of candidates for judicial office. *Id.* 25a. Indeed, he reasoned, "it is the responsibility of the judicial candidates to state their views on legal philosophy and to explain how those views differ from their opponents," and only by citing specific examples can a candidate meet this responsibility effectively. Otherwise, the public would be judging candidates solely by their personal appearances. *Id.* 26a. Dr. Wesley concluded that there was insufficient evidence of any violation of the Code except the contention that respondent had challenged his opponent to a public debate; on that issue, Dr. Wesley concluded that respondent should be admonished. *Id.* 27a.

Respondent then appealed to the Kentucky Supreme Court, all of whose members disqualified themselves, and were replaced by a special Supreme Court appointed by the Governor. Respondent argued both that he had not violated the Code of Judicial Conduct, and that the Canons that had been cited against him violated both the state and the federal constitutions. In that regard, he relied on the free speech clauses and the judicial election clause of the Kentucky Constitution, as well as the First Amendment and the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution.

On February 14, 1991, the Kentucky Supreme Court unanimously reversed petitioner's decision, agreeing with Dr. Wesley that the Commission's findings of fact were clearly erroneous, and that its order was contrary to both state and federal law. Pet. App. 3a. The court agreed that respondent had been shown to have violated Canon 7B(1)(c) by announcing his views on disputed legal issues, but it rejected the conclusion that he had violated that Canon by making pledges of preferential treatment. Pet. App. 8a. The court further held that respondent had not violated Canons 1, 2, or 7B(1)(a) by failing to uphold the integrity of the judiciary, to promote the impartiality of the judiciary, or to maintain the dignity appropriate to judicial office. Pet. App. 9a. All of these charges, except the statement of views on disputed legal issues, were dismissed for lack of evidence.

Turning to respondents' statements regarding legal issues, the Kentucky Supreme Court held that both the Commission's order, and the portion of Canon 7 concerning statements on "disputed legal issues," violated the state and federal constitutions. The court ruled that the state and federal free speech clauses had

been violated because a citizen does not surrender all of his free speech rights by becoming a candidate for judicial office. Pet. App. 3a-4a. The court below also invoked Section 117 of the Kentucky Constitution, which provides for popular election of judges. The Canon forbidding discussion of issues is inconsistent with this clause, according to the court, because it

> strictly prohibits dialogue on virtually every issue that would be of interest to the voting public. . . . [A] judicial candidate's qualifications for the position . . . would include, among other things, knowledge of the law, and personal views and beliefs. Instead, we are encouraging the public to judge candidates for our judiciary by not much more than their personal appearances. We believe a well-informed electorate is essential to the democratic election process guaranteed by the Kentucky Constitution. The rights of the voting public to hear what a candidate has to say is a compelling one.
>
> Pet. App. 7a.

Moreover, the court reasoned, the ban on any statements concerning disputed legal or political issues is far broader than is necessary to accomplish the state's legitimate purposes. *Id.* Instead of barring all discussions of legal issues, the Canon might be revised to bar only "making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Id.* 8a. The court noted that the American Bar Association had recently amended its Model Code of Judicial Conduct to substitute this narrower language for earlier language identical to the Kentucky Canon, and that the reason for this change was that the older language "was an overly broad restriction on speech." *Id.*, *quoting* Commentary on ABA Model Code (August 1990). Indeed, Special Justice Bertram, concurring, went on to recommend that the Supreme Court revise the Canon to make it consistent with the constitutions. *Id.* 10a.

By Order of April 4, 1991, the Kentucky Supreme Court accepted the recommendation of Special Justice Bertram and revised Canon 7B(1)(c), the only rule that was found to have been

violated. The Court struck the language barring any discussion of "disputed legal or political issues," and substituted the new language from the ABA Model Code that bars statements that "commit or appear to commit" the candidate on matters before the court.

REASONS FOR DENYING THE WRIT

A. The Decision Below Rests on Adequate and Independent State Grounds, and the Legal Issue Involved Is Unimportant Because Kentucky Has Modified Its Code to Eliminate the Language That Was Struck Down in This Case.

Even if the legal question in this case were worthy of review in a proper case, there are two reasons why this case does not present a proper vehicle for their consideration: *first*, the decision below rests on adequate and independent state grounds, and *second*, Kentucky has now amended the only state rule that respondent was found to have violated, so that, even though the case is technically not moot, the underlying controversy has lost most of its importance.

1. The petition purports to present two questions of federal constitutional law. The first question is the validity of Canon 7B(1) under the First Amendment, "on its face or as applied in this case"; the second question is whether Canons 1 and 2 may constitutionally be applied to respondent's campaign statements.

However, the second question is not before this Court, because the Kentucky Supreme Court held that there was insufficient evidence in the record to warrant the application of Canons 1 and 2 to respondent's campaign statements as a matter of state law. Only with respect to the portion of Canon 7B(1)(c) that pertains to statements on "disputed issues" did that Court find a violation that required a constitutional ruling. Thus, with respect to the alleged "pledge of preferential treatment," the court stated, "we could find no evidence to support the Commission's findings." Pet. App. 8a. With respect to alleged "pledges or promises of conduct in office," the court held, "we did not find that the statements . . . amounted to pledges or promises of conduct in office." *Id.* And with respect to Canons 1, 2 and 7B(1)(a), the court determined, "we can find no evidence that

violations of these Canons occurred.... To criticize the provisions of the Code and published court decisions does not in our view, in and of itself, undermine the public's confidence and respect for the judiciary." *Id.* 9a. Thus, although there is an intimation in the opinion below that, as applied to respondent's conduct, Canons 1 and 2 might also be inconsistent with the state and federal constitutions, *id.* 7a, the court never actually reached that question because it concluded that no violation of those Canons had been proved as a matter of state law.

With respect to Canon 7B(1)(c), the court below did find a violation, but its invalidation nevertheless rests on an adequate and independent ground that deprives this Court of jurisdiction. With respect to the free speech violation, the court below squarely rested its judgment on both of the two free speech clauses in the state constitution, Sections 1 and 8, as well as on the First Amendment. Even if this might not be sufficient to form an adequate and independent state ground, the court also relied on a state constitutional provision, Section 117, guaranteeing the popular election of judges, that has no parallel in the federal constitution. The Kentucky Supreme Court held that this constitutional guarantee encompasses the right of the people to learn the legal and political views of judicial candidates. Pet. App. 7a.

Whatever conclusion this Court might ultimately reach concerning the First Amendment, the judgment below would have to be affirmed because of the holdings of the court below about the Kentucky Constitution's effect on Canon 7B(1)(c) and about the lack of evidence to show a violation of Canons 1 and 2. These holdings, of course, cannot be reviewed in this Court, and hence the Court would be issuing a purely advisory opinion. Accordingly, this case is not a proper vehicle for resolving the federal constitutional questions that the petition seeks to present.

2. As the petition acknowledges, at 13, the Kentucky Supreme Court has now repealed the relevant language in Canon 7 that barred candidates from stating their views on disputed legal and political issues, and substituted new language, drawn from a similar change in the ABA Model Code, that forbids candidates from committing themselves concerning cases and issues likely to come before the court. We agree with petitioner that this change does not make the case moot, in the strict Article III sense of the term, because the validity of the punishment meted out to respon-

dent was based on the Canon as it stood at the time of his campaign statements. Nevertheless, the change affects the certworthiness of the case, because it makes clear that the reversal that petitioner solicits from this Court would govern no future case, but may only affect whether respondent may be punished for his statements. Indeed, the change, which was not compelled by the order of the special panel, strongly suggests that the Kentucky Supreme Court, which is responsible for deciding what rules should govern state judicial ethics, does not share petitioner's anxiety for a constitutional confrontation over the validity of the old language in Canon 7B(1)(c).

Moreover, in changing Kentucky's Canon, the court below was simply following the guidance of the ABA's Model Code, which was promulgated in August, 1990. Given the recent vintage of this change, and the practice of the States in looking to the ABA for guidance, it seems likely that other states will be changing their codes as well. Thus, insofar as the petition relies on the similarity between Kentucky's Canon and the canons in other states to support the contention that this case presents an important question that should be resolved immediately, this change also counsels waiting to see whether other states follow the lead of Kentucky and the ABA, rather than reaching out to address the constitutionality of a rule that may be obsolete.

In an effort to save its case, petitioner contends, at 13, that "in light of the stipulated record, . . . this case would [not] be significantly different constitutionally under the amended rule." The accuracy of this prediction is by no means clear, because it assumes that the rule against making commitments concerning future rulings on particular issues extends to forbid criticisms of past rulings on particular issues, such as respondent made in this case. That interpretive question should be decided by the Kentucky courts, in an actual controversy, before this Court reaches out to decide the constitutional validity of such a rule. Indeed, although the Commission's counsel is apparently confident that respondent's statements criticizing past judicial opinions constitute commitments to rule in a certain way on certain issues in the future, the court below apparently disagreed, because it rejected as clearly erroneous the Commission's finding that the statements "amounted to pledges or promises of conduct in office." Pet. App. 8a.

Accordingly, this case does not present a genuine case or controversy over the constitutionality of the new rule, or an appropriate vehicle for assessing the constitutionality of the superseded rule.

B. The Decision Below Accords With the General Trend Concerning Permissible Statements in Judicial Elections, and There Are No Broad Conflicts, Among the Lower Federal and State Courts, Whose Resolution is Required.

Even if the Court concludes that the constitutional validity of the rule against statements about "disputed legal or political issues" is squarely presented here, there is no broad conflict over that issue among the lower courts. To the extent that the issue has been litigated at all, the decision below is in accord with both of the trial courts that have decided the issue.

Petitioner cites only two decisions as presenting the conflict that warrants a grant of certiorari: *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), and *In re Kaiser*, 111 Wash. 275, 759 P.2d 392 (1988). *Berger*, however, involved a judicial candidate who wanted to make statements criticizing certain aspects of judicial administration, such as the failure to use alternative dispute resolution procedures; the case did not involve general speech on legal or political issues. The district court construed the canon to permit statements about procedural questions in order to avoid constitutional issues, and then proceeded to deny a preliminary injunction against the canon as thus construed. And *In re Kaiser*, 111 Wash. 275, 759 P.2d 392 (1988), rejected an "as applied" attack on the portion of Canon 7B(1) that forbids judges from making "'pledges or promises' of partiality," 759 P.2d at 395, 400 -- a part of the Canon that was held in this case not to have been violated as a factual matter -- while also holding that the candidate's criticism of the incumbent was constitutionally protected. *Id.* at 397-399.

The other cases that petitioner cites are of no more help. In *Morial v. Judiciary Comm. of Louisiana*, 565 F.2d 295 (5th Cir. 1977), the issue was not Canon 7B(1)(c), but rather a statute forbidding sitting judges from running for political office. Similarly, although *In re Seraphim*, 97 Wis. 485, 294 N.W.2d 485 (1980), contains some general dictum that not all speech by judges is

constitutionally protected, the case did not involve the Canon on campaigning; in fact, the speech for which constitutional protection was claimed in *Seraphim* involved off-the-bench sexual advances and intemperate, on-the-bench berating of lawyers, witnesses and defendants. Finally, *In re Baker*, 218 Kan. 209, 549 P.2d 701 (1975), only upheld discipline for false statements about the incumbent.

On the other hand, the petition ignores the only two district court decisions that did squarely confront the validity of the bar on statements about legal issues, both of which struck down rules identical to the one at issue here. In *ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990), the court invalidated a broad proscription of statements about legal or political issues, while conceding -- in agreement with the Kentucky Supreme Court here -- that a state could properly sanction statements "which might be construed as particularized pledges of conduct." *Id.* at 1098. Similarly, in *Stretton v. Disciplinary Board*, 763 F. Supp. 128 (E.D. Pa. 1991), *appeal pending*, the court struck down the ban on statements about "disputed legal or political issues," while referring with apparent approval -- again in agreement with the court below -- to the revised ABA Model Code that replaced the challenged language with a rule against "making statements that commit or appear to commit the candidate" on impending cases or issues. *Id.* at 138. Thus, to the extent that the issue here has been litigated, the decision below is in accord with the consensus view of the lower courts, and no intervention by this Court is required to resolve a conflict.

Nor does petitioner demonstrate that the decision below conflicts with previous decisions of this Court. In that regard, the petition vaguely cites as "analogous" two cases that upheld statutory limitations on the free speech rights of civil servants, Pet. 12, while ignoring the numerous decisions cited by the court below, and discussed in the Florida and Pennsylvania cases, that apply the strictest of tests to state rules that purport to limit the right to speak on behalf of one's own candidacy in an election. Neither of the decisions cited by petitioner discusses the question of how the public can make an informed choice about which candidate to elect if the candidates are forbidden from discussing any of the real issues in the election. And neither case involved a rule, enacted by incumbent judges, that limited the ability of

other judges to criticize the incumbents' decisions in appealing to the voters to change the holders of judicial offices.

Even in the Court's most recent foray into the conflict between professional ethical rules and free speech, four members of the Court would have applied a strict standard to rules that forbade a lawyer from criticizing the administration of justice, even in a pending case, *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732-2736 (1991). The remaining Justices agreed that, whatever rules were permissible with respect to the duties of a lawyer pertaining to a proceeding that is currently pending in court, a different standard might apply "to other lawyers." *Id.*, 111 S. Ct. at 2744 n.5. The Court also deemed it significant whether the case posed a direct challenge to a Model Rule of the ABA, with five Justices emphasizing that a direct challenge to a national standard was involved, *id.* at 2741-2742 and n.4, and the other Justices relying on their conclusion that only a unique Nevada variant was at stake. *Id.* at 2725-2726. The ABA's Model Code of Judicial Conduct is of course not at stake in this case, inasmuch as it was amended last year precisely because of the free speech problems posed by a blanket ban on discussion of legal and political issues, as the Kentucky Canon formerly provided.

The pre-amendment Canon, taken literally as petitioner seems to do, would forbid judges even from writing law review articles, speaking at law schools and bar meetings about the law, or sending messages to the legislature about the State of the Judiciary, not to speak of discussing the issues that the voters are entitled to consider in deciding which candidate can best serve them. Although a number of state judicial disciplinary commission decisions address such issues, the state and federal courts have only begun to grapple with them, even in a non-constitutional context. *See generally* Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* § 11.08 (1990). And, of the lower court decisions that may be found addressing the specific question here, both are in accord with the decision of the Kentucky Supreme Court. Thus, even if the Court considers the question to be one that warrants review, and even if the Court considers that it has jurisdiction because there is no independent state ground, it should wait for a case that presents the constitutionality of the rule against statements on disputed legal and political issues cleanly, as this case fails to do.

CONCLUSION

The petition for a writ of certiorari should be denied.

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